

DEPARTMENT OF INSURANCE
OFFICE OF THE COMMISSIONER

Statutory Authority: 18 Delaware Code, Sections 311 and 2312 (18 **Del.C.** §§311 & 2312)
18 **DE Admin. Code** 902

PROPOSED

PUBLIC NOTICE

902 Prohibited Unfair Claim Settlement Practices

A. Type of Regulatory Action Required

Second re-proposal of amendments to Regulation 902 - Prohibited Unfair Claim Settlement Practices [Formerly Regulation 26].

B. Synopsis of Subject Matter of the Regulation

In the May 1, 2020 edition of the *Register of Regulations*, the Department published a proposal to update and clarify requirements concerning prohibited unfair claim settlement practices that are set forth in Regulation 902 (see 23 **DE Reg.** 920 (05/01/2020)). In that proposal, the Department proposed adding new subsection 3.1.14, which included a failure to promptly settle a claim as required under Regulation 903 as an unfair claim settlement practice. The Department also took the opportunity of the proposal to make grammatical and formatting edits throughout the regulation.

Upon further review, the Department determined not to proceed with proposed new subsection 3.1.14 and withdrew that proposal, as violations of Regulation 903 are already a defined unfair claims settlement practice.

Instead, the Department proposed to add new subsection 3.2, which would have specifically provided that three instances of an insurer's commission of a prohibited claim settlement practice within a 36-month period, as listed in subsection 1.2.1 (to be recodified at subsection 3.1), shall give rise to a rebuttable presumption that the insurer is in violation of this regulation and 18 **Del. C.** §2304(16)f. This first re-proposal was published in the June 1, 2020 edition of the *Register of Regulations* (see 23 **DE Reg.** 997 (06/01/2020)). The Department again took the opportunity of the re-proposal to make grammatical and formatting edits throughout the regulation.

C. Summary of Comments on the First Re-Proposal

The Department received several comments from insurance industry-related stakeholders, many of whom expressed surprise that the Department would propose such an amendment because the commenters were not aware of any negative market conduct trends in Delaware that would have led the Department to take such action.

One commenter objected that proposed new subsection 3.2 would discourage informal resolution of market conduct exam findings, "emphatically discourage self-reporting and self-remediation of claims processing errors or violations, even if unintentional and harmless to policyholders, and . . . would unfairly expose insurers to bad faith actions that are, on the merits, unfounded, based on a 'general practices' presumption of just three violations over 36 months.

Other commenters opined that proposed new subsection 3.2 makes Delaware's regulation exceed the expectations set forth in the 2008 National Association of Insurance Commissioners (NAIC) Model Unfair Claims Settlement Act. In that Act, the NAIC discussed defining "general business practice" but chose not to define it, instead opting to establish a statistically based benchmark error rate of seven percent for auditing claim practices and 10 percent for other trade practices. These commenters went on to opine that Delaware would be the only state in the nation to set numeric limits on numbers of claims over a specified time that would trigger the rebuttable presumption of an unfair trade practice.

The commenters also pointed out that, in their opinion, the specific number of claims (3) over a set time period (36 months) is unfair and untenable for companies that process thousands of claims per month, further stating that while some of the Department's regulations understandably contain "three strikes" provisions, those provisions are relegated to the health care arena. These commenters concluded that three claims in three years does not rise to the level of an unfair business practice; unfair business practice should be reserved for systemic violations, not for a mistake made due to human error.

D. Summary of Department's Second Re-proposal

On re-proposal, the Department has determined to revise proposed new subsection 3.2 to provide that:

An insurer's commission of prohibited unfair claim settlement practices listed in subsection 3.1 of this regulation in four percent or more of claims sampled by the Department during any investigation or examination of the insurer, shall give rise to a rebuttable presumption that the insurer is in violation of this regulation and 18 **Del. C.** §2304(16)f.

The Delaware Code authority for the regulation and the proposed amendments is 18 **Del.C.** §§311 and 2312.

E. Notice and Public Comment for the Second Re-Proposal

The Department has determined to hold a virtual public hearing on the proposed amendments to Regulation 902 on **October 22, 2020 at 9:00 a.m.** The hearing will be facilitated through WebEx at <https://stateofdelaware.webex.com/stateofdelaware/j.php?MTID=mcb66b1d7794ffd79b6a2b963bb23bb43> meeting number (access code): 173 669 0005 and meeting password: Fp7rW3juew9.

Holding a virtual public meeting is specifically permitted by Paragraph 5 of the Declaration of a State of Emergency for the State of Delaware due to a Public Health Threat issued by Governor John Carney on March 12, 2020 and extended monthly thereafter (see <https://governor.delaware.gov/health-soe/> for the complete list of modifications and extensions).

The proposed amendments appear below and may also be viewed on the Department of Insurance website at <http://insurance.delaware.gov/information/proposedregs/>.

Any person may file written comments, suggestions, briefs, and compilations of data or other materials concerning the proposed amendments to the regulation. Any written submission in response to this notice and relevant to the proposed amendments must be received by the Department of Insurance no later than 4:30 p.m. EST, the 6th day of November 2020. Any such requests and any questions concerning connecting to the public hearing should be directed to:

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902 Prohibited Unfair Claim Settlement Practices [Formerly Regulation 26]

~~Claim Settlement Practices Which, When Committed Or Performed with Such Frequency as to Indicate a General Business Practice, Are Prohibited~~

1.0 Purpose

~~The purpose of this regulation is to set forth unfair claim settlement practices which, when committed or performed with such frequency as to indicate a general business practice, are prohibited.~~

2.0 Authority

~~This regulation is adopted by the Commissioner pursuant to the authority granted by 18 Del.C. §§311 and 2312, and promulgated in accordance with the Delaware Administrative Procedures Act, 29 Del.C. Ch. 101.~~

4.0 ~~3.0~~ Authority for Regulation; Basis for Regulation Prohibited Unfair Claims Settlement Practices

- 4.1 ~~18 Del.C. §314~~ authorizes the Insurance Commissioner to "...make reasonable rules and regulations necessary for or as an aid to the administration or effectuation of any provision of this title."
- 4.2 ~~18 Del.C. Ch. 23~~ entitled "Unfair Business Practices in the Insurance Business," ~~18 Del.C. §2304(16) Unfair Claim Settlement Practices; 18 Del.C. §2304(17) Failure to Maintain Complaint Handling Procedures; and 18 Del.C. §2304(18) Misrepresentation in Insurance Applications,~~ provide the basis for this regulation.
- 4.2.4 ~~3.1~~ 3.1 The Following Claim Settlement Practices When Committed or Performed following unfair claim settlement practices when committed or performed with such Frequency ~~frequency~~ as to Indicate a General Practice ~~are Prohibited~~ indicate a general business practice are prohibited:
 - 4.2.4.4 3.1.1 Misrepresenting pertinent facts or insurance policy provisions relating to coverage at issue.
 - 4.2.4.2 3.1.2 Failing to acknowledge and respond within 15 working days, upon receipt by the insurer, to communications with respect to claims by insureds arising under insurance policies.
 - 4.2.4.3 3.1.3 Failing to implement prompt investigation of claims arising under insurance policies within 10 working days upon receipt of the notice of loss by the insurer.
 - 4.2.4.4 3.1.4 Refusing to pay claims without conducting an investigation based upon all available information when the notice of loss received by the insurer indicates that such an investigation is necessary to properly determine such a denial of payment.
 - 4.2.4.5 3.1.5 Failing to affirm or deny coverage or a claim or advise the person presenting the claim, in writing, or other proper legal manner, of the reason for the inability to do so, within 30 days after proof of loss statements have been received by the insurer.

- 4.2.1.6 3.1.6 Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims in which liability has become clear.
- 4.2.1.7 3.1.7 Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts which they might be entitled to under normal fair claims evaluations.
- 4.2.1.8 3.1.8 Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application.
- 4.2.1.9 3.1.9 Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge of the insured.
- 4.2.1.10 3.1.10 Making claims payments to insured or beneficiaries not accompanied by a statement setting forth the coverage under which the payment has been made.
- 4.2.1.11 3.1.11 Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of a formal proof of loss form, both of which submissions contain substantially the same information, unless the formal proof of loss is required by law, prevailing rules, or the policy.
- 4.2.1.12 3.1.12 Failing to promptly settle claims, where liability has become clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.
- 4.2.1.13 3.1.13 Failing when requested to promptly provide an explanation of the basis in the insurance policy in relation to facts or applicable law for denial of a claim or for the offer of a compromise settlement. Such explanation may be made verbally but when given, must be documented in the claims file.

3.2 An insurer's commission of prohibited unfair claim settlement practices listed in subsection 3.1 of this regulation in four percent or more of claims sampled by the Department during any investigation or examination of the insurer, shall give rise to a rebuttable presumption that the insurer is in violation of this regulation and 18 Del.C. §2304(16)f.

2.0 4.0 Violations; Penalties

2.4 Failure to comply will subject the violators to the provisions of ~~18 Del.C. §1732 (c)(2) and 18 Del.C. §2307(a)~~ 18 Del.C. §§1712, 2307(a) and 2308, which ~~deals deal~~ with hearings, license revocation, suspension or fine for non-compliance of any regulation.

3.0 5.0 Severability

If any provision of this Regulation shall be held invalid, the remainder of the Regulation shall not be affected thereby.

4.0 6.0 Effective Date

This Regulation ~~shall become~~ became effective August 1, 1977. The amendments to this Regulation shall become effective ten (10) days after publication of the final order adopting the amendments.

24 DE Reg. 330 (10/01/20) (Prop.)